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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 830

DOOLEY BROS., INC.,
Petitioner,

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

FRANCIS J. ULMAN,
18 Tremont Street,
Boston, Mass.,
REUBEN GOODMAN,
1 State Street,
Boston, Mass.,
Attorneys for Petitioner.

MAURICE CARO,
JOSEPH FISHER,
18 Tremont Street,
Boston, Mass.,
Of Counsel.

ALDEN C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The undersigned on behalf of Dooley Bros., Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above cause on December 19, 1960, reversing a judgment of the United States District Court for the District of Massachusetts.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit (*infra*, pp. 24-31) has not been reported. The opinion of District Judge Charles E. Wyzanski, Jr., is reported in 181 F. Supp. 312 (R. 28-33).[1]

[1] Record references are to Record Appendix to Brief for Appellant, as printed for the use of the Court of Appeals, nine copies of which have been filed with the Court.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented.

Petitioner is an independent contractor, operating only in Massachusetts, engaged in collecting and transporting to city dumps waste, rubbish and debris from households, retail businesses, other business organizations and government agencies in Boston and neighboring communities.

The question presented is whether the Fair Labor Standards Act covers employees of petitioner who, during part of each week, make collections from businesses and government agencies which are engaged in commerce or in the production of goods for commerce.

Statutes Involved.

The provision of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201 *et seq.*), particularly involved here is section 3 (j):

> "Sec. 3 [52 Stat. 1061; 63 Stat. 911]. As used in this Act,
>
> . . . . . .
>
> "(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed

in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."[2]

Section 7 (a) of the Act is also applicable:

"Sec. 7. (a) [52 Stat. 1063; 63 Stat. 912]. Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Statement.

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin the petitioner from alleged violations of the overtime and record keeping provisions of the Act (R. 2, 3). There is no dispute as to the following facts, which were stipulated or stated in affidavits:

Petitioner is a Massachusetts corporation, an independent contractor, and is engaged in collecting in trucks and transporting to dumps all kinds of residential and industrial rubbish, waste and debris in Boston and nearby communities (R. 10, 12, 13). It collects rubbish, garbage and ashes from bid districts under contracts with the City of

[2] Before its amendment in 1949 the last clause of section 3 (j) read: "or in any process or occupation necessary to the production thereof, in any State." 52 Stat. 1061.

Boston, and also from commercial firms and federal agencies in the Boston Metropolitan area (R. 9). The establishments it services include federal agencies and business organizations engaged in commerce or in the production of goods for commerce (R. 10, 11).

The rubbish removed by petitioner is put into dump trucks from containers and barrels which abutters have left on the sidewalks, or which in some instances industrial customers have left inside their buildings on elevators or loading platforms. Petitioner's employees leave the barrels after they are emptied on the sidewalk or return them to the elevator or platform (R. 9, 13). The rubbish from industrial and commercial establishments is placed with residential rubbish in the trucks and is not segregated (R. 13, 14). It is dumped in various city dumps (R. 9).

Six of the petitioner's employees regularly and recurrently collect from government agencies and business organizations engaged in commerce or in the production of goods for commerce, as well as from retail establishments and private homes (R. 11). These six employees spend an estimated one-fourth to one-third of their time in collecting from establishments and agencies subject to the Fair Labor Standards Act (R. 13). The six employees regularly worked in excess of forty hours a week without receiving time and one-half for hours worked over forty in the week, and the petitioner failed to maintain an accurate record of the hours worked by them (R. 11, 12).

Letters from a number of business firms to a Wage and Hour Division investigator, attached to the investigator's affidavit, state the quantities of waste usually removed from the firm's premises by Dooley Bros. each week and the frequency of removals, generally once or twice each week, but in some instances daily. The writers indicate the importance of removal of waste for sanitary reasons and for the prevention of fires, and that an accumulation

of unremoved waste at their premises would interfere with business operations (R. 15-26).

The District Court allowed a motion of the defendant for summary judgment. It concluded that "none of the defendant's employees" nor "the defendant itself" was engaged in commerce or in the production of goods for commerce, and that the "occupation of a rubbish collector for an independent local service company" is not "closely related" (R. 32). The Court of Appeals reversed, concluding that the occupation is "closely related" under section 3 (j) of the Act.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals for the First Circuit in the instant case is directly contrary to the decision of this Court in *10 East 40th Street Building, Inc.*, v. *Callus*, 325 U.S. 578, and inconsistent with the decision in *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310.

In the *10 East 40th Street Building, Inc.*, case, decided in 1945, the Court ruled that maintenance employees of a forty-eight-story office building leased to more than one hundred tenants, 48 per cent of the rented area of which was occupied by executive, sales and publicity offices of businesses engaged in the production of goods for interstate commerce, were not engaged in "occupations 'necessary to the production' of goods for commerce," because of the weight the Court gave to the purpose of Congress, in enacting the statute, "to leave local business to the protection of the states." 325 U.S. 578, 582.

> "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a

building engaged in local business. . . . [R]emoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. . . . Our problem is not an exercise in scholastic logic." 325 U.S. 578, 583.

The Court, notwithstanding the importance of safe and habitable buildings to commerce and to production for commerce, ruled that the practical differences between buildings tenanted by manufacturers, *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517, or the office building of a large interstate producer, *Borden Co.* v. *Borella*, 325 U.S. 679, on the one hand, and an office building housing the usual miscellany of offices, on the other, were, despite identical employee duties (see *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, 315), of sufficient significance to warrant the exclusion of the general office building from the Act, as an enterprise "more in the nature of local business than not." *10 East 40th Street Building, Inc.*, v. *Callus*, 325 U.S. 578, 583, 584.

Certainly, the petitioner, an intrastate disposal company, collecting rubbish from residences and a miscellany

of other properties, including a number owned or occupied by enterprises engaged in commerce or in the production of goods for commerce, is more clearly and incontrovertibly engaged in a local business than the operator of a forty-eight-story office building in which 42 per cent of the rentable space is occupied by tenants subject to the Fair Labor Standards Act.

Petitioner's employees in the course of their duties empty into trucks rubbish and waste which the owners or occupants of buildings in Metropolitan Boston have left in barrels and containers outside their premises or at an accessible spot in their premises; the employees return the barrels to the spot from which they were taken; they truck the rubbish until they have collected a full load; finally, they drive the load to a local dump. Even the two collections in which the drivers go into the basement of the building and raise the barrels, one or four at a time, to the street (R. 13), involve only brief and casual contact by the employees with the business of the customer. Certainly the business of petitioner "spontaneously satisfies the common understanding of what is local business." See *10 East 40th Street Building, Inc.*, v. *Callus*, 325 U.S. 578, 583.

In *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, 313, the Court again considered "the penetrating and elusive duty" of defining its scope which the Fair Labor Standards Act casts upon the Courts. The Court held that employees engaged in building a dam for a municipal water supply district were not covered by the Act. Upon completion of the dam the water impounded by it was to be supplied to the district, where somewhat less than half of it would be used by producers. In holding the employees not to have been engaged in occupations "closely related" and "directly essential" (p. 321) to production, the Court noted the concern of Congress to "avoid undue displace-

ment of state regulation of activities of a dominantly local character" (p. 316), and emphasized that coverage under the last clause of section 3 (j) "is furthest removed in the scheme of the statute from the hub of the national interest in 'commerce' upon which a limited displacement of state power is predicated" (p. 316). The opinion distinguished the *Zachry* case from *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, by the fact that in the *Zachry* case water was to be supplied to a miscellany of users throughout the geographical area while the water system in *Farmers Reservoir* was to be used exclusively to supply water to farmers producing for commerce.

Judge Wyzanski of the District Court, in accordance with the standards laid down by this Court in the above-cited cases, considered the petitioner's engaging in an independent local service industry, its serving a miscellany of customers, and its rendering a type of service seldom performed by interstate industry for itself, as "the dominant factors in the present case" (R. 32). The petitioner respectfully urges that the Court of Appeals in reversing his decision has disregarded standards long followed by this Court in the administration of the Act.

2. The decision of the Court of Appeals for the First Circuit misreads the intention expressed by the Congress in adopting the 1949 amendment to section 3 (j) of the Act, and nullifies the intention of Congress to avoid undue displacement of state control over activities of a predominantly local character.

The petitioner submits that it was the intention of Congress in amending the last clause of 3 (j) to reverse decisions of the Courts and rulings of the Administrator holding various kinds of independent local service businesses subject to the Act solely because their customers included concerns engaged in commerce or in producing

for commerce, notwithstanding that the service businesses were not themselves engaged in commerce or in producing for commerce, did not furnish parts or supplies, and rendered their services to manufacturers and interstate enterprises only incidentally to the operation of their local service companies.

Both the opinions below consider the legislative history of the 1949 amendment of 3 (j). The District Court held it clear that the changes of language in the last clause of the section were made to exclude from the Act's coverage some employees of local service companies previously held to be covered (R. 30, 31). The Court of Appeals deemed the legislative history of the amendment "multidirectional and correspondingly inconclusive" (*infra*, p. 28). In holding Dooley Bros. operations not excluded from the Act by the amendment, the District Court stated that "it can be said that what Congress intended to preclude was a kind of comprehensiveness which would permit the linking of a lost horseshoe nail with a lost kingdom" (*infra*, p. 31).

In order to isolate the intentions of Congress with respect to local service companies from the considerations deemed applicable to other kinds of business operations on the periphery of the Act, we have collected in part A of the Appendix those parts of the House and Senate reports and debates on the amendment of the last clause of section 3 (j) pertinent to service industries[3] (*infra*, pp. 15-20). This material demonstrates that the House spon-

[3] The Appendix excludes any references to such other kinds of local business as building maintenance, performers of clerical, maintenance and custodial services for producers for commerce, repairers of machinery or equipment, operators of feeding facilities for employees, fertilizer companies, etc., which, to a certain extent, involve considerations in the application of the last clause of section 3 (j) different from those applicable to local service companies.

sors of the amendment intended to make absolutely clear "the congressional intent that local business was to be excluded" (95 Cong. Rec. 11001); that the House conferees intended that "the Administrator and the Courts will no longer be able to hold the act applicable" to such businesses as a local window-cleaning company, a local nursery, and a local exterminator firm (H.R. Conf. Rep. No. 1453, 81st Cong. 14, 15); and that the Senate conferees "intended to prevent extension of coverage to such operations as window cleaning and grass cutting," and the conferees of both houses understood "that the definition as finally agreed to was intended to have a substantially limiting effect on the coverage of the Act as heretofore interpreted by both the Administrator and the courts" (95 Cong. Rec. 14880).

The constricted interpretation by the Court of Appeals of the amendment of section 3 (j) is untenable and frustrates the clearly expressed intention of Congress in enacting the amendment.

A writ of certiorari should be granted because of the great number and diversity of local businesses and their uncounted hundreds of thousands of employees, whose responsibilities and status under the Act are affected by the extensive broadening of coverage under section 3 (j), sanctioned by the decision of the Court of Appeals.

3. The decision of the Court of Appeals approves and enforces the attempt of the Administrator to exercise jurisdiction over an industry to which the Act has not been applied since its passage, and permits the Administrator to enforce the Act beyond the limits announced in his own administrative bulletins.

The opinion of the Court of Appeals noted that "the activities that Dooley Bros. are engaged in . . . have not

been judicially passed upon, either before or after the amendment" (*infra*, p. 26). That opinion makes no reference to policies previously announced and followed by Administrators in the administration of the Act. The District Court's opinion describes the Administrator's Interpretative Bulletin, Part 776, Subpart A (29 C.F.R. 776.0-776.21), as revealing "a grudging attitude toward the disclosed policy and obvious purpose of the 1949 amendment, and a more than hospitable attitude toward the pre-1949 cases interpreting the basic 1938 statute" (R. 31).

The Courts below differed in their views of what was meant by the term "closely related." In an effort to isolate from the masses of conflicting tests and considerations applicable to problems of coverage under section 3 (j) generally, in all their "protean diversity," we have reprinted in part B of the Appendix (*infra*, pp. 20-23) those parts of Interpretative Bulletin, Part 776, particularly portions of sections 776.17 and 776.19 (a) (3) and (b) (5), which deal with considerations particularly applicable to the drawing of the line between the covered and uncovered activities of local independent service businesses. In section 776.17 (c) (1) and (2), the pertinent parts of which are reproduced in full in the Appendix (*infra*, pp. 21-22), the Administrator refers to the following criteria, *inter alia*, as important: Its relationship to production in terms of the place or time of its performance, the purposes with which the work is performed, the relative directness or indirectness of the activity's effect on production, whether employment is within or outside the enterprise, whether the performance is with a view to aiding production or for some other purpose, the immediacy of its effect on production, the number and nature of intervening operations or processes between the activity and production, and

the characteristics and purposes of the employer's business.

There is no indication in the opinion of the Court of Appeals that it analyzed the relationship to actual production for commerce of Dooley Bros. employees, as they made their brief calls, brought the barrels to the street, if the abutter had not left them on the sidewalk, and put the contents in the Dooley Bros. truck before proceeding on their rounds of collection and dumping.

Such an analysis on the basis of the letters in the record (R. 15-26) would reveal that several of the writers are not engaged in production at all, but are engaged in commerce; that collections by Dooley Bros. from its commercial and industrial customers mostly consisted of sweepings and trash, discarded containers in which incoming shipments had been received (R. 19, 20, 21), used paper wipers and shavings (R. 23), discarded film (R. 22), ashes (R. 27), and similar waste. The immediate reason for removal, emphasized in virtually all the letters, was sanitation and fire prevention. These are primarily subject to state and local regulation. In no case was there an indication that petitioner's activities have an immediate or direct effect on production of goods for commerce, although some letters expressed fear that a prolonged accumulation of rubbish would make business activities more difficult and eventually impossible to carry on. Snowstorms, fires, transit strikes and other local conditions may seriously interfere with or stop local services and thus interfere with or stop production for commerce in affected enterprises, a consideration which has never been thought to make such services "closely related" or "directly essential" to production.

Dooley Bros. employees had no contact with production, even in making pickups from the minority of commercial and industrial customers who may have been engaged in

production. Indeed, in most instances the rubbish is left on a loading platform in an alley or outside a rear door where Dooley Bros. men pick it up. The relationship of Dooley Bros. to production for commerce is even more remote than that of the independent window-cleaning firm engaged in cleaning windows in industrial plants on contract. *Martino* v. *Michigan Window Cleaning Co.*, 327 U.S. 173. The debates and reports in Congress several times emphasize the *Martino* case as an important unwarranted extension of coverage of the Act which the amendment of section 3 (j) was intended to reverse. In the *Martino* case the employees were carrying on regular housekeeping activities of the kind often performed by a producer's own employees or by direct employees in buildings to which *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517, is applicable. The Dooley Bros. employees merely render a contract service to the petitioner's customers.

The petitioner contends that the District Court was plainly right in holding "the occupation of rubbish collector for an independent local service company" not to be "closely related" to production of goods for commerce (R. 32).

4. The question of the extent of the reach of the Fair Labor Standards Act over service businesses is of such importance to the administration of the Act as to warrant the issuance by this Court of a writ of certiorari. *McLeod* v. *Threlkeld*, 319 U.S. 491, 492. In addition the decision of the Court of Appeals authorizing application of the Act's record-keeping and maximum-hours provisions to Dooley Bros. will affect not only thousands of private local rubbish contractors, and their more than one hundred thousand employees, but also many comparable service industries. The uncertainties introduced into the opera-

tion of the Act by the decision of the Court of Appeals and by the broad extension of what have been considered heretofore the limits of coverage of the Act require review by this Court.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS J. ULMAN,
REUBEN GOODMAN,
Attorneys for Petitioner.

Of counsel:
MAURICE CARO,
JOSEPH FISHER.

Appendix.

A.

Parts of legislative history of the 1949 amendment to section 3(j) of the Fair Labor Standards Act pertinent to the limitation of the coverage of the Act over local businesses not engaged in commerce or in the production of goods for commerce, and not supplying materials or products essential to commerce or the production of goods for commerce.

HOUSE OF REPRESENTATIVES

[95 Cong. Rec. 11001]

"MR. LUCAS: . . . The first principal difference between my bill and the Lesinski bill is found in section 3(j) in the definition of the word 'produced'.

"Section 3(j) changes the latter part of the existing definition of 'produced' by providing that an employee shall be deemed engaged in the production of goods if he is employed in any closely related process or occupation indispensable to the production thereof. The changes consist of (a) inserting the words 'closely related' before the words 'process or occupation', and (b) substituting the word 'indispensable' for the word 'necessary'. These changes are needed in order to stem, and in some cases, reverse the action of the administrator and the Courts in bringing under the act many businesses of a purely local type by giving to the word 'necessary' an all-inclusive construction. . . .

"The proposed changes would, however, reverse the Supreme Court's ruling that the act applies to a local window-cleaning company doing business wholly within the state but some of whose customers are engaged in interstate commerce or in the production of goods for inter-

state commerce—*Martino v. Michigan Window Cleaning Co.* (327 U.S. 173, rehearing denied 327 U.S. 816) . . .

"Nor could the Administrator hold the act applicable as he has in the past to the following:

"(a) Employees of a local independent nursery concern whose duties include mowing the lawn around the plant of a customer within the State engaged in producing goods for interstate commerce—1944-45 Wage-Hour Manual, page 125; . . .

"(c) Employees of a local exterminator service firm, who work wholly within the State exterminating pests in private houses, apartments, hotels, barber shops, colleges, hospitals and also in buildings within the State used to produce goods for interstate commerce—3 C.C.H. Labor Law Reporter, fourth edition, paragraphs 25,150.385; . . .

"The basis, upon which the administrator and the courts have relied in sweeping all of the foregoing local retail businesses under the act has been that some of the customers of such businesses are engaged in the production of goods for interstate commerce and therefore the employees of the local retail businesses are engaged in a process or occupation necessary to the production of goods for interstate commerce; notwithstanding that all of their goods or services are sold or rendered within the State to customers located within the State. The rulings of the Administrator and the Courts have ignored the history of the law showing the absolutely clear congressional intent that local business was to be excluded. The amendment to section 3(j) proposed in the substitute bill would make it clear that the law is to be applied within the bounds originally contemplated . . .

"I do not believe there is a member of this House who wants the present Act to remain just as it is on the books. It has been carried too far for us to allow it to remain on the books. One of the reasons I am most anxious that we

enact some legislation of this character is because if we do not clarify these provisions of the law the Administrator is going to go to the courts and say: 'The Congress had this bill before it; it took no action upon it; therefore it has confirmed our past actions.' So they can even extend the meaning of this act even further beyond anything ever intended by the Congress."

STATEMENT OF HOUSE MANAGERS ACCOMPANYING CONFERENCE REPORT.

H.R. Conf. Rep. No. 1453, 81st Cong. 14, 15; 95 Cong. Rec. 14929.

"The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production. . . .

"3. Employees of a local window-cleaning company doing business wholly within the State but many of whose customers are engaged in interstate commerce or in the production of goods for interstate commerce (*Martino v. Michigan Window Cleaning Company*, 327 U.S. 173; rehearing denied 327 U.S. 816).

"4. Employees of a local independent nursery concern whose duties include mowing the lawn around the plant of a customer within the State engaged in producing goods for interstate commerce (1944-45 W. H. Man., p. 125).

. . .

"6. Employees of a local exterminator service firm, who work wholly within the State exterminating roaches and other pests in private houses, apartments, hotels, barber shops, colleges, hospitals and also in buildings within the State used to produce goods for interstate commerce (3 C.C.H. Labor Law Reporter, 4th ed. No. 25,150.385).

"All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory workers are quite clearly not performing any activities that are closely related or directly essential to the production of goods. . . ."

SENATE.

95 Cong. Rec. 14880.

Statement Submitted by the Senator from Ohio, Mr. Taft. (Minority report.)

"On October eighteenth Senator Pepper submitted a statement expressing the views of a majority of the Senate conferees as to the intentions of the conference which prepared the conference report on the Minimum Wage bill. It seems to me that this report was prepared in the first instance by the Attorneys for the Wage-Hour Administration in an effort on their part to retain jurisdiction in various fields which the conference report clearly intended to take away from them. The Wage-Hour Administration for years has been trying to extend its jurisdiction beyond the field provided by Congress and is now trying to nullify the present Congressional Action.

"The conference committee never considered this statement or summary, nor was there ever any meeting of the Senate conferees to consider or discuss it. My own view is that the report and the Act finally adopted speaks for itself. . . .

"Likewise the conferees agreed to a redefinition of the term 'produced' intending to prevent extension of coverage to such operations as 'window-cleaning' and 'grass cutting' on the farfetched theory that such operations are necessary to the production of goods . . . The summary,

prepared in the office of the Administrator, in many instances seeks to confirm those very interpretations of coverage which the conferees were seeking to reverse.

"Produced

"The conferees in their meetings had before them a memorandum setting forth specific cases showing the extreme lengths to which the Administrator and the courts had gone in interpreting the term 'produced'. The conferees were in agreement that such cases should be overruled. The cases discussed and the agreement of the conferees are set forth in detail at pp. 14-15 of the Statement of the Managers on the Part of the House.

"During the meetings of the conference committee the House conferees insisted that the definition of the term contained in the House bill be agreed to. They yielded only to the extent of agreeing to substitute the words 'directly essential' for the word 'indispensable' in the definition. It was understood by both the House and Senate conferees, however, that the definition as finally agreed to was intended to have a substantially limiting effect upon the coverage of the Act as heretofore interpreted by both the Administrator and the courts. Nothing is more clear than that there would never have been any conference agreement on a minimum wage bill, had the Senate conferees not agreed to such narrowing of the Act's coverage.

"The summary, however, in effect states that the redefinition of 'produced' has not had the effect of cutting down the coverage of the Act at all, but has merely provided a more specific guide and created more certainty as to coverage. His summary concedes only that under the redefinition, coverage is not to be extended to the following activities of employees:

"1. Procurement of land for a new factory.

"2. Manufacture of bricks for new factory buildings.

"3. Employees of a local real estate firm renting apartments or dwelling houses to tenants, some of whom are employees of a factory producing goods for interstate commerce..

"But no change in the definition was needed to assure that the Act would not be extended to such activities or employees, since neither the Administrator nor the courts had ever held or even hinted that such activities or employees were covered.

"The summary is chiefly concerned with pointing out that the redefinition of 'produced' has done no more than to confirm all outstanding interpretations of such term—both administrative and judicial. . . ."

B.

Parts of the Administrator's Interpretative Bulletin 776 particularly applicable to coverage of employment in a process or occupation which meets needs of producers of goods, but in which the employer of employees, whose coverage is in issue, is an independent local business which is not engaged in commerce or in production for commerce.

DEPARTMENT OF LABOR INTERPRETATIVE BULLETIN, PART 776, SUB-PART A.

[29 C.F.R. 776.0-776.21]

"Section 776.17—EMPLOYMENT IN A 'CLOSELY RELATED PROCESS OR OCCUPATION DIRECTLY ESSENTIAL TO' PRODUCTION OF GOODS

"(a) . . .

"The legislative history shows that the new language in the final clause of section 3 (j) of the act is intended to narrow, and to provide a more precise guide to, the

scope of its coverage with respect to employees . . . whose coverage under the Act formerly depended on whether their work was 'necessary' to the production of goods for commerce. . . .

"(b) . . .

". . . Similarly, there are some situations in which an employee performing work 'directly essential' to production by an employer other than his own may not be covered because the kind of work and the circumstances under which it is performed show *the employee's activities to be so much a part of an essentially local business operated by his employer that it would be unrealistic to consider them 'closely related' to the productive activities of another.* [Emphasis supplied.]

"(c) *Determining whether activities are 'closely related' and 'directly essential'* . . .

"(1) The close relationship of an activity to production, which may be tested by a wide variety of relevant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or function of the activity in the productive enterprise. The words 'directly essential' refer only to the relationship of the employee's work to production. Work 'directly essential' to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems clear, on the other hand, that the criteria for determining whether a process or occupation is 'closely related' to production cannot be limited to those which show its closeness in terms of need or function. It may also be important to ascertain, for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the place or the time of its performance, or in terms of the purposes with which the activity is performed by

the particular employer through the employee, or in terms of relative directness or indirectness of the activity's effect in relation to such production, or in terms of employment within or outside the productive enterprise.

"(2) The determination of whether an activity is closely or only remotely related to production may thus involve consideration of such factors, among others, as the contribution which the activity makes to the production; who performs the activity; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view to aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employer's business. . . .

Section 776.19—Employees of independent employers meeting needs of producers for commerce

"(a) (3) . . .

". . . in determining whether an employee's work is 'closely' or only remotely related to the production of goods for commerce by an employer other than his own, the nature and purpose of the business in which he is employed and in the course of which he performs the work may sometimes become important.

"Such factors may prove decisive in particular situations where the employee's work, although 'directly essential' to the production of goods by someone other than his employer, is not far from the borderline between those activities which are 'directly essential' and those which are not. In such a situation, it may appear that his performance of the work is so much a part of an essentially local business carried on by his employer without any in-

tent or purpose of aiding production of goods for commerce by others that the work, as thus performed, may not reasonably be considered 'closely related' to such production. . . .

"(b) (5) . . .

". . . the House managers of the bill made it clear that employees engaged in cleaning windows or cutting grass at the plant of a producer of goods for commerce were not intended to be included as employees doing work 'closely related' to production or 'on behalf of' the producer where they were employed by a 'local window-cleaning company' or a 'local independent nursery concern,' merely because the customers of the employer happen to include producers of goods for commerce. A similar view was expressed with respect to employees of a 'local exterminator service firm' working wholly within the State exterminating pests in private homes, in a variety of local establishments, 'and also in buildings within the State used to produce goods for interstate commerce.' "

Opinion of the Court of Appeals.

December 19, 1960

ALDRICH, *Circuit Judge*. These two cases brought by the Secretary of Labor under the Fair Labor Standards Act, 29 U.S.C. §§201-19, involve identical issues and similar facts and should have been heard together. Before we realized this we permitted the Secretary to argue the one later filed first, and the other the following month. We treat them in one opinion. It was agreed that the defendants in both cases failed to meet the act's requirements for overtime. 29 U.S.C. §207. The only issue is whether the employee or employees in question were "engaged in the production of goods for commerce" as that phrase is defined by section 3(j), discussed more fully below.[1] Each case was decided on a motion for summary judgment. In *Kletjian*, the one first argued, the court granted plaintiff Secretary's motion. In *Dooley Bros.*, the defendant's was granted. In each case there is an appeal from the adverse judgment.

The facts in the *Kletjian* case were not controverted. Kletjian is an independent contractor providing cleaning services to businesses engaged in commerce or in the production of goods for commerce. From August 1957 to

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[1] Section 207 also covers employees "engaged in commerce." 29 U.S.C. §207(a). Whether there is any difference involved in the application of this alternative phrase, defined in *Mitchell* v. *C. W. Volmer & Co.*, 1955, 349 U.S. 427, 429, has been a source of difficulty. *Compare Johnson* v. *Dallas Downtown Development Co.*, 5 Cir., 1942, 132 F.2d 287, 289, *cert. den.*, 318 U.S. 790, *and Stoike* v. *First National Bank of New York*, 1943, 290 N.Y. 195, 201-04, *cert. den.*, 320 U.S. 762, *with H. B. Zachry Co.* v. *Mitchell*, 5 Cir., 1959, 262 F.2d 546, 551-52, *affirmed*, 362 U.S. 310, *and Mitchell* v. *S. A. Healy Co.*, D.C.N.D.Ill., 1960, F.Supp. , *rev'd on other grounds*, 7 Cir., October 31, 1960, F.2d . The cases were argued here, and apparently below, without reference to this second basis of coverage, and we do not feel compelled to explore it.

April 1959 he employed one Didris, who did general janitorial work for customers contracting for Kletjian's services such as sweeping up, emptying wastebaskets, washing and waxing floors, washing windows and cleaning restrooms.

In *Dooley Bros.* we must first consider a procedural matter to determine what facts are before us. The defendant accompanied its motion for summary judgment with an affidavit, and the plaintiff filed the affidavit of an investigator in opposition. Included in plaintiff's counteraffidavit were purported copies of letters from some of defendant's admitted customers. In *Jefferson Construction Co.* v. *United States*, 1 Cir., 1960, F.2d we noted that in order to comply with Rule 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C., affidavits on motions for summary judgment must be on personal knowledge, and held that a statement based on "undisclosed conversations with unnamed employees" clearly was not. Logically, a copy of a letter, even verbatim and signed, is still unauthenticated and hearsay. However, the court below stated in its opinion that it "assumes the accuracy of every fact . . ." in plaintiff's affidavit." In *Jefferson* we raised, but did not answer, the question of how far under Rule 56(d) and 56(f) a court might go beyond a strictly proper counteraffidavit to find a genuine issue of fact. We do not believe it would have been error in the case at bar for the court to have refused to consider these letters. But having done so without apparent objection below, we will not concern ourselves with any possible impropriety. See 6 Moore, Federal Practice 2335 & n. 50 (1959).

Dooley Bros., Inc., is an independent contractor some of whose employees remove rubbish, garbage, and ashes from concerns and federal agencies which are engaged in commerce or in the production of goods for commerce, as well as from local commercial firms and private dwellings. The

"debris" is placed in barrels by the customers, and these barrels are picked up on the sidewalk by the defendant's employees and emptied into its trucks. If specially requested, the employees will enter the buildings and pick up the barrels from elevators and loading platforms. The debris is not moved in interstate commerce after its collection. It was estimated that certain named employees spend one-fourth to one-third of their time making collections from establishments engaged in commerce or in the production of goods for commerce. It appears from the letters in the counteraffidavit that some of these customers contract to have their refuse collected three times a week, and others even daily, and that they consider such frequent disposal, because of the nature of the refuse, to be "essential" to carrying on their business. Some speak of lack of space, but others state that inflammability of their waste product would create a fire hazard, and others that its perishable nature would cause accumulations to violate health regulations.

The issue in *Kletjian* is both narrow and specific, namely, whether the 1949 amendment removed from the purvue of the act janitorial services of the sort performed by Didris. Prior to the amendment such services were included. *A. B. Kirschbaum Co.* v. *Walling*, 1942, 316 U.S. 517, 519.[2] On the other hand, the particular activities that Dooley Bros. are engaged in, to the extent that they may be thought to differ, have not been judicially passed upon, either before or after the amendment.

Section 3(j) of the act as originally passed, 52 Stat. 1061, 29 U.S.C. §203(j) (1938), provided in part that "for

[2] *Kirschbaum* was an even weaker case for the Secretary because the janitorial services there were performed only in the public portions of buildings in which quarters were leased to producers of goods, see *Fleming* v. *A. B. Kirschbaum Co.*, D.C.E.D.Pa., 1941, 38 F.Supp. 204, 205, while in the case at bar Didris worked on premises directly occupied.

the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production* thereof." (Ital. suppl.) The 1949 amendment substituted for the italicized words, "*or in any closely related process or occupation directly essential to the production.*" Act of October 26, 1949, 63 Stat. 911. To some extent the purpose of this statutory change was to limit peripheral definitions adopted by some courts, but in the main it was a nod of approval. See *Mitchell* v. *H. B. Zachry Co.*, 1960, 362 U.S. 310, 316-17. The problem is to determine where the nod stops and the frown begins.

Our difficulties are accented by the legislative history leading to the enactment of the amendment since, as the Supreme Court has pointed out, the reports of the conferees representing the two houses of Congress give somewhat inconsistent explanations. *Mitchell* v. *H. B. Zachry Co.*, *supra* at 317. However, there is little difficulty in the *Kletjian* case. Both houses appear to agree that the amendment was not intended to alter *Kirschbaum*. See H.Rep. No. 1453, 81st Cong., 1st Sess., 95 Cong. Rec. 14928-29 (1949); Report of Majority of Senate Conferees, 95 Cong. Rec. 14875 (1949). (Hereinafter the reports will be cited only to the Congressional Record.) Indeed, even without this suggestion we would assume that *Kirschbaum* remained intact because the language of the amendment was largely borrowed from the Court's characterization in that case of activities which included the very kind we are here considering. See *A. B. Kirschbaum Co.* v. *Walling*, *supra* at 525-26. Appellant contends that it was only the general approach of *Kirschbaum* which was approved. This claim is seemingly based on the Court's recognition in *Zachry* that Congress had not approved everything done under

the prior language of the act. The argument does not go far enough. See *Mitchell* v. *H. B. Zachry Co., supra* at 317; *Mitchell* v. *Joyce Agency, Inc.*, 1955, 348 U.S. 945, *affirming Durkin* v. *Joyce Agency, Inc.*, D.C.N.D.Ill., 1953, 110 F.Supp. 918; *Mitchell* v. *Famous Realty, Inc.*, 2 Cir., 1954, 211 F.2d 198, 199, *cert. den.*, 348 U.S. 823. Nor is it assisted by pointing out possible inconsistencies. It is too much to hope that unassailable logic can deal with every question in this multifaceted field. In borderline cases we can not draw heavily on analogies any more than we can depend upon formulae or convenient generalizations. See *Mitchell* v. *H. B. Zachry Co., supra* at 313.

Possibly the best approach to *Dooley* is to review the district court's opinion setting forth the contentions favorable to the defendant. The court begins by saying that the legislative history of the amendment is of "cardinal significance." If by that it means unusually helpful significance, we cannot agree. As previously pointed out, this history is multidirectional and correspondingly inconclusive. We have the same objection to the court's attributing to the amendment a "disclosed policy and obvious purpose" to limit prior interpretations generously. While, admittedly, there was an intent to limit, there was an apparent difference of degree disclosed between the House and Senate Reports. *Compare* 95 Cong. Rec. 14928-29 *with* 95 Cong. Rec. 14874-75. Even the House view, which interpreted the restrictive nature of the amendment the more liberally, was not announced as "generous." For example, Congressman McConnell, a member of the House Conference Committee, stated that it was estimated to remove from the act "less than 200,000 workers."[3] The Supreme

[3] 95 Cong. Rec. 14936. As of this time it was estimated that there were over 20 million covered workers. On this basis less than one per cent would be affected. Thirty-eighth Annual Report of the Secretary of Labor (1950) pp. 272-274.

Court described the amendment as introducing "some restraint." *Zachry, supra* at 317. We nowhere find any basis for the district court's enlargement of that characterization to "generous."

However, our rejection of the court's basic approach is not as determinative as is our disagreement with its treatment of what it termed the "dominant factors" of the present case. (1) Neither Dooley nor its employees are actually engaged in interstate commerce or in the production of goods for commerce. This fact has little relevance—witness "repairmen, maintenance men, custodians, or guards," listed by the court itself as examples of persons who are unquestionably covered. (2) Dooley and its employees are in an independent local service industry. The amendment leaves unchanged the principle that it is the nature of the work being done, and not the nature of the employer's business, that is controlling. See *Mitchell v. Lublin, McGaughy & Associates*, 1959, 358 U.S. 207, 211; 95 Cong. Rec. 14929, 14875. (3) Dooley's customers include "local businesses and private homes." Such mixed employment has never been held to deprive an employee of coverage. Indeed, as little as 3.3% of an employer's customers in interstate activities was held sufficient prior to the amendment. *Roland Elec. Co. v. Walling*, 1946, 326 U.S. 657. The Senate Report expressly approved this decision, 95 Cong. Rec. 14874, 14875, and one of the House Managers asserted that the House Report had approved it indirectly, 95 Cong. Rec. 14942 (remarks of Representative Lesinski). In the case at bar the employees spent one-fourth to one-third of their time in covered activities. (4) Dooley's type of service is frequently performed by municipal employees. This, no doubt, is true, but we fail to see its relevance. (5) "A layman . . . would never think of the rubbish collector as in an occupation related to producing goods." This is a novel and, we believe, highly

dangerous test. There are many things about many statutes that might seem incomprehensible even to lawyers if they lacked appropriate historical knowledge and legal experience.

Finally, the court felt that rubbish collectors are more like window washers, who admittedly [4] were intended to be removed by the amendment, than they are like some other workers who were not excluded. Even if this approach were permissible, we would question the accuracy of the court's comparison. We conceive of many differences between occasionally cleaning a window and the continuous process of removing debris which the letters in the affidavit indicate were necessary to efficient or even lawful carrying on of the interstate business. Moreover, the court apparently conceded that rubbish removal was "directly essential" to Dooley's customers, but thought it not "closely related." It appears to us that Congress wished to exclude window washers because it considered them nonessential. See 95 Cong. Rec. 14936 (remarks of Congressman McConnell).

In any event, we think the court misinterpreted the phrase "closely related." In *Casa Baldrich, Inc.* v. *Mitchell*, 1 Cir., 1954, 214 F.2d 703 at 706-07, Judge Magruder succinctly analyzed its meaning. An activity is to be considered remotely, as distinguished from closely, related when "it ministers to the requirements of workers who are not themselves in the actual production of goods for commerce." The Supreme Court has subsequently drawn the same distinction in the *Zachry* case. There the Court separated repair and maintenance from construction of a dam. It agreed that both might be directly essential to

[4] The House Report expressly disapproved of *Martino* v. *Michigan Window Cleaning Co.*, 1946, 327 U.S. 173, which had held window washers were employees under the act. 95 Cong. Rec. 14929. The Secretary has accepted that limitation.

producers relying on water. It said maintenance and repair were associated with operation of the dam—that is, the function of supplying water—but that building the dam was more remote—only making it possible that, at a later stage, water could be supplied. 362 U.S. at 319.[5] In effect, although we dislike generalizations, we think at least it can be said that what Congress intended to preclude was a kind of comprehensiveness which would permit the linking of a lost horseshoe nail with a lost kingdom. In the present case the removal of the debris seems as closely related as it does essential.

In Kletjian v. *Mitchell the judgment of the district court will be affirmed, and in Mitchell* v. *Dooley Bros., Inc., reversed and the case remanded for further proceedings.*

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[5] In explaining the phrase to the House, one of the House Managers gave what is perhaps an even more vivid example. Employees of a dealer who sells sawmill equipment to a producer of mine props, which are sold to a mine within the same state producing coal for commerce, are excluded; but the employees of the mine prop producer are included. 95 Cong. Rec. 14942 (remarks of Representative Lesinski).